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HAROLD B. WILLEY, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 464

UNITED STATES OF AMERICA,
Appellant,

vs.

THE BORDEN COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF BELOIT DAIRY COMPANY, APPELLEE.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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OPINION BELOW.

The District Court's memorandum and order dismissing the complaint (R. 80-133) is reported at 111 F. Supp. 562. The opinion and order limiting the issues and the proof (R. 48-52), and the findings of fact, conclusions of law, and judgment (R. 113-125) are not reported.

JURISDICTION.

On March 30, 1953, the District Court entered an order dismissing the complaint (R. 112). On June 17, 1953, the District Court entered its findings of fact, conclusions of

law and judgment (R. 113). On August 6, 1953 plaintiff's timely motion for a new trial was denied (R. 161). The appeal was allowed on October 2, 1953 (R. 43). The jurisdiction of this Court was invoked under Section 2 of the Expediting Act, 32 Stat. 823, 15 U. S. C. 29, as amended 62 Stat. 869. On October 19, 1953, this appellee filed a separate motion to dismiss or affirm as to it. The Court noted probable jurisdiction on December 14, 1953 (R. 443).

QUESTION PRESENTED.

With respect to the dismissal below of the Government's claims against Beloit Dairy Company under Sections 1 and 2 of the Sherman Act, the question is whether the trial court excluded any competent evidence which, in conjunction with competent evidence admitted at the trial, would prove that Beloit conspired with the other defendants to restrain trade in fluid milk as alleged in the complaint.

No question has been brought to this Court concerning the trial court's dismissal of the Government's claim against Beloit for violation of Section 2(a) of the Clayton Act.

STATEMENT.

This suit was filed on June 18, 1951, by the United States against ten Chicago dairies, seeking to enjoin an alleged conspiracy to restrain and monopolize the wholesale market for fluid milk in the Chicago area of Illinois, and to enjoin price discriminations by each defendant in sales to its various wholesale customers. The complaint relied upon Sections 1 and 2 of the Sherman Act and Section 2(a) of the Clayton Act as amended.

The gist of the alleged violation of the Sherman Act was that defendants had conspired to allocate the patronage of some of the local grocery stores, restaurants, hotels

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and institutions, including public institutions, among themselves in that each agreed not to solicit, bid for or accept the patronage of such customers served by any of the other defendants.

On June 26, 1952, the trial court denied defendant's alternative motions to dismiss the complaint for failure to state a claim or to strike the complaint for joining too many diverse claims (R. 7).

For a further statement of the general development of this case, this Appellee adopts the Statement appearing in the Brief of Appellees The Borden Company, Belmont Dairy Company, Ridgeview Farms Dairy, Inc., and Bowman Dairy Company.

Beloit calls particular attention to the fact that it was not a party to the suit filed in 1949 by the Dean Milk Company against the other defendants, in preparation for which the disputed tape recordings were made (R. 423). No Beloit representative was among the solicitors questioned by plaintiff's lawyer Newey, when he was making the records (Gov't Br. p. 21, note 12). Moreover, Beloit was not notified of the taking of the disputed deposition of H. C. Eggleston by the plaintiff in the *Dean* case. Beloit was not represented there (R. 52, Gov't Br. p. 35, note 18), nor has the Government offered to prove (R. 52-64) that Beloit was referred to in either the questions or the answers.

All of the smaller independent defendant companies in the present case except Beloit were parties to the *Dean* case, and consented to the decree in that case (R. 109-110, 122-123) and all entered into a consent decree with the Government in this case (R. 41-48). Beloit elected to stand trial.

Much of Beloit's competition came from other small dairies not named as defendants. Beloit had its problems with these competitors, which it handled by itself, without

the knowledge, consent or assistance of any other defendants. When Lake Valley Farm Products took Beloit's one public institution customer (Municipal Tuberculosis Sanitarium) (R. 105) from Beloit, Lake Valley was threatened with retaliation in kind by Beloit (R. 104). In a similar instance, Beloit retaliated by submitting a low bid for the patronage of another institution (Home for Incurables) (R. 105), usually served by another non-defendant dairy which had taken the Sanitarium business from Beloit (R. 105). After reviewing the testimony of non-defendants which had obtained the patronage of the Municipal Tuberculosis Sanitarium at various times, along with a comparable instance involving other parties, the trial court said (R. 105):

> "Each incident involves the action taken by one defendant dairy when another dairy attempted to capture an account. Beloit, for example, looked upon the Sanitarium as 'its account'; and Beloit became aggressive when another dairy bid for Beloit business. The court holds however, as it must, that these four isolated instances cannot establish the existence of a conspiracy among ten defendant dairies."

The trial court's Finding of Fact on the subject of these instances, number 28 (R. 120-121), is:

> "With respect to each of the foregoing incidents, there is no evidence of threats of reprisals or reprisals by any defendant other than the defendant which had most frequently been serving the institution prior to the bid by the non-defendant milk distributor. Nor is there any evidence that the making of these threats of reprisals or reprisals by any particular defendant were known to any of the other defendants."

The Government's evidence of Beloit's relationship to other defendants (of which there were nine) consisted of testimony of three former employees of one co-defendant that they understood from conversations with their respec-

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tive supervisors, at Bowman, that they were not to solicit Beloit customers (R. 86, 87, 365). Three other Bowman solicitors were not told about aggressive little Beloit as a dairy of which to be wary (R. 85, 86-87). The Government did not question the supervisors of Herbert Horton, Johnston or Heinz to corroborate their testimony as to the instructions they were given, although one of the supervisors (Buthman) was on the stand later (Trial Transcript 1838, *et seq.*). Horton and Heinz did not state any reasons given them for not soliciting Beloit stops, nor did either state that there were any Beloit stops in their sales territories. Johnston said his supervisor told him to go ahead and take the Beloit stop he wanted (R. 87), and that Bowman later gave it up or lost it to Wanzer, a non-defendant dairy (R. 87).

Having reviewed the testimony of such former solicitors, the court stated (R. 88):

> "Each of the witnesses is a former employee of one of the defendants, and each expressed some degree of animosity toward his former employer. Johnston, in particular, was hostile during cross-examination, and as I noted earlier, the Bowman Company had once accused him of dishonesty. The testimony of each of the witnesses is, therefore, open to some suspicion. Assuming arguendo that all of the foregoing testimony is true, however, just what relationship among the defendants is indicated? * * *
>
> "* * * Three Bowman solicitors testified that they were similarly instructed not to solicit stops served by Borden and certain other dairies. However, the court notes that the instructions which these solicitors said they received are at variance with the terms of the conspiracy alleged in the complaint. * * *"

This testimony was admitted over objection made by Beloit (R. 153) "to testimony as to conversations between employees of other defendants, * * * as not binding upon the

objecting defendant, as hearsay, and as not competent t
prove any issue in the case with respect to it."

The trial judge overruled the above and other objection
when they were made, with the reservation that (R. 155)

> "at the end of all the evidence, if it appears that dat
> is not connected up, * * * or if it appears from th
> final testimony that some of it is purely hearsay, tha
> that may still be argued by the parties * * *."

After the Government had rested, Beloit argued that thi
testimony was hearsay and not connected up by any indc
pendent evidence showing Beloit was a co-conspirato
bound by Bowman employee's admissions, and the cour
agreed.

In his opinion reviewing the evidence, the Trial Judg
said (R. 106):

> "Needless to state, there is no direct evidence o
> an agreement or understanding among the defendants
> There is no evidence of intercorporate communicatio
> or of significant meetings between alleged conspira
> tors, although the evidence purports to cover a perio
> of over twelve years. The Government must rely, then
> upon inferences drawn from the conduct of the defend
> ants."

There was no evidence of actions by Beloit consistent
with the alleged terms of the conspiracy. Beloit was not
shown ever to have:

(1) Instructed any solicitor not to solicit customers
of any other dairies,

(2) Refused to serve a customer of any other dairy
desiring to purchase Beloit products,

(3) Traded stops with any other dairy,

(4) Suggested to a customer of a defendant dairy
that he buy from another small dairy for awhile before
starting to buy from Beloit ("farm-outs").

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Nor was it shown that Beloit had knowledge of the instructions which Herbert Horton and Heinz said their supervisors at Bowman gave them, to leave Beloit's stops alone or the instructions which Johnston said he was given, to take one stop from Beloit covertly by means of a "farm-out" to Wanzer.

Beloit was a small dairy which "became aggressive" when business was taken from it by competitors (R. 105). There was no evidence that Beloit was less "aggressive" in defending itself against its co-defendants than in competing with non-defendants. Beloit did not compete against the Dean Milk Company, which was a rising challenger in the paper carton market (grocery stores) but did not sell in the bulk market (hotels and restaurants). Hence, Beloit had lost no restaurant or hotel trade to Dean, and Beloit did not try to get store customers from Dean. Thus Beloit was not confronted by similar problems and did not act in a way parallel to Bowman and Borden (R. 107).

After hearing closing arguments, the Court found (Finding of Fact number 34, R. 121):

> "All the evidence competent as to Beloit fails to establish the existence of a conspiracy, as alleged in the complaint, or the participation therein by Beloit."

Thus the evidence admitted at the trial did not show that Beloit conspired with others, and did not show conduct from which any inference of such conspiring by Beloit might have been drawn.

As to the Clayton Act claim against Beloit the trial court's Finding of Fact Number 35 (R. 121) was that:

> "The plaintiff has offered competent and creditable evidence of only one sale by Beloit to a wholesale customer; that was the sale of certain dairy products to the Eitel Restaurant in Chicago in 1947."

And its Conclusion of Law Number 8 (R. 124) was that

> "In order to establish an unlawful discrimination in price under Section 2(a) of the Clayton Act, as amended, the plaintiff must prove the occurrence of at least two sales. Therefore, with respect to Beloit, the plaintiff has not shown a right to relief under Section 2(a) of the Clayton Act."

SUMMARY OF ARGUMENT.

The Government did not prove the existence of the conspiracy alleged in the Complaint, nor the participation by Beloit in such a conspiracy. Whether or not the evidence excluded from the record by the rulings complained of on this appeal might have helped to establish the existence of a conspiracy, none of such evidence would help to establish the participation of Beloit Dairy Company therein.

Where there is no competent evidence which could support a judgment against one alleged co-conspirator, the dismissal of that individual party should be affirmed. Since the Government concedes the lack of any evidence sufficient to establish Beloit's liability in the record of the trial, and does not show that any such evidence was offered and excluded, the judgment dismissing this case as to Beloit should now be affirmed.

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ARGUMENT.

I.

Unless the Trial Court Improperly Excluded Competent Evidence That Beloit Conspired With the Other Defendants to Restrain Trade in Fluid Milk as Alleged in the Complaint, the Dismissal of the Case Against Beloit Should be Affirmed.

The Government does not appeal from the trial court's findings that no conspiracy was proved, but, on the contrary, states (Brief 32) at the beginning of its Argument:

> "We do not challenge the court's conclusion that, on the record before it, the Government had not shown conspiracy. But we do contend that, if the court had permitted the Government to utilize and introduce the foregoing excluded evidence, it could not reasonably have granted the motion to dismiss the complaint."

Obviously, if the Government did not *offer* any competent evidence that Beloit conspired with the other defendants to restrain trade in fluid milk as alleged in the complaint, it cannot complain of the fact that the trial court granted Beloit's individual motion to dismiss, read into the record at the close of the Government's case after the Government had rested. This motion appears at page 429 of the printed record.

The dismissal of the Government's claim against Beloit should be affirmed by this Court irrespective of whether the excluded evidence might establish a conspiracy between defendants other than Beloit. In *Bailey* v. *Zlotnick*, 133 F. 2d 35, 38 (App. D. C., 1942), the case had been dismissed against all three defendants by the trial court. The complaint alleged that the defendants were jointly

liable to the plaintiff in tort. The Court of Appe found that the dismissal was proper as to the defend Beloff but erroneous as to the other two defendants, affirmed the judgment of dismissal as to Beloff only. also *Washington Gas Light Co.* v. *Lansden,* 172 U. S. (1899).

The Government's burden in this Court is to show t Beloit would have been convicted of conspiring with other defendants if the trial court had admitted (1) deposition of H. C. Eggleston, to impeach the creditabi of Eggleston's trial testimony and enhance the creditabi of Heinz' deposition, (2) the tape recordings made by att ney Paul Newey in preparing the case of *Dean Milk C pany* v. *American Processing and Sales Company, I et al.,* for trial, and (3) the testimony of Hans Moser as his conversation with the deceased Mr. Baril.

II.

None of the Evidence Excluded by the Trial Court De With Beloit or Its Alleged Participation in a Conspi acy.

None of the points raised by the Government on this peal, and none of the "Questions Presented" (p. 2 Government brief), would, however decided by this Cou open the way to proof that Beloit conspired with anyo refrained from soliciting anyone, or refused to sell anyone.

The Government specifies (Br. 26-27) that the dist court erred in refusing to receive (1) the deposition gi by Eggleston in the *Dean* case offered for the purpose impeaching his trial testimony in this case, (2) tape reco ings made by the Government's witness, Newey, and testimony by the Government's witness, Moser, as to a c versation with Baril, a deceased agent of Borden. Unl

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one or all of these alleged errors substantially affected the rights of the Government against Beloit Dairy Company, the judgment dismissing Beloit Dairy Company must be affirmed on this appeal (see Note 8 in Brief of the other Appellees, p. 19). We shall consider the three items in the order listed above.

1. The Eggleston Deposition in the Dean Case.

Eggleston said nothing about Beloit at the trial, and the Government does not show that Eggleston mentioned Beloit in his deposition in the *Dean* case. Moreover, the deposition could not have been used against Beloit Dairy Company, even for the purpose of contradicting or impeaching Eggleston's testimony as a witness if there had been a conflict of statements on the two different occasions. This is so because Beloit was not present or represented at the taking of the deposition and had no notice thereof, not being a party to the *Dean* case.[1]

The Government asserts that the court would have had less reason to doubt the testimony of its witness Heinz, if it had been allowed to impeach Eggleston with the aid

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1. Rule 26(d), F. R. C. P., restricts the use of depositions in the following terms:

> "*Use of Depositions.* At the trial * * *, any part or all of a deposition, so far as admissible under the rules of evidence, may be *used against any party who was present or represented at the taking of the deposition or who had due notice thereof,* in accordance with any one of the following provisions:
>
> '(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.' " (Emphasis supplied.)

Thus a deposition which contradicts or impeaches the deponent's testimony as a witness may be used only against parties which had notice of, or attended or were represented at, the taking of the deposition. This rule forbids use of a deposition against a non-participant, whether the purpose is impeachment or other purposes, since the limitation in the first sentence of Rule 26(d) applies equally to all of the provisions in the subparagraphs which follow the first sentence.

of the deposition. However, there was no conflict of testimony between Eggleston and Heinz which had any bearing on the allegations as to Beloit. Even if the court, might have given more credence to Heinz' testimony, had it given less credence to that of Eggleston, it would have found nothing in Heinz' testimony to affect its judgment dismissing Beloit.

Heinz mentioned Beloit only once, at which time he stated that in 1936, long before the cut-off date of September 16, 1940, his supervisor at Bowman had directed him not to solicit stops being served by Beloit. Heinz did not say whether any reason was given for this instruction. Moreover, this testimony was clearly incompetent hearsay as to Beloit.

As this Court stated in *Glasser* v. *United States,* 315 U. S. 60 (1942), declarations of one conspirator in furtherance of the objects of the conspiracy "are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy * * *. (Citing cases.) Otherwise hearsay would lift itself by its own boot straps to the level of competent evidence." See also, *Bihn* v. *United States,* 328 U. S. 633 (1946). The cases cited by the Government (note 22 on pages 40-41) are all cases in which there was independent proof of the conspiracy. In *American Tobacco Co.* v. *United States,* 147 F. 2d 93, 118 (C. A. 6), so cited by the Government, the court expressly stated that at the time the evidence in question was introduced, "there was already a prima facie showing of conspiracy."

The inconclusive nature of Heinz' statement, the fact that it referred to a period before Bowman was enjoined by the 1940 consent decree, and its incompetence as to Beloit are all factors which make it clear that Heinz' testimony could not change the substantial rights of the United States *vis-a-vis* Beloit.

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2. The Tape Recordings.

The witness Newey made no tape recordings of any conversations with any representative of Beloit (R. 423). Newey did state (R. 375) that Mr. Kost, representing Hawthorn, named Beloit when he named several dairies whose stops could not be taken. However, Newey admitted on cross-examination (R. 421) that "what recalls to your mind that Mr. Kost said that he couldn't take Beloit stops" was a reference in the verbatim transcript of the tape recording of Newey's conversation with Kost which said that Kost had gotten "a place up on Western Avenue right across from River Park, John's * * *," which was a former Beloit customer whose business Kost had been trying to get "for two or three years."

Thus, the only indication that Beloit was mentioned in any of the Newey tape recordings was a reference to strenuous efforts by a co-defendant to persuade a Beloit customer to begin taking milk from the co-defendant, which efforts were finally successful.

3. The Moser-Baril Conversation.

The offer of proof as to the conversations between Moser and Baril (R. 65) included no references whatsoever to Beloit.

CONCLUSION.

Nothing which the Government here contends the trial judge should have received in evidence would have sufficed to establish that Beloit was a party to a conspiracy to restrain commerce in fluid milk in violation of the Sherman Act. This being true, the judgment of the trial court dismissing this case as to Beloit should now be affirmed.

Respectfully submitted,

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